

**Remarks**

Claims 1-7, 9, and 11 are pending in the subject application.

**Double Patenting:**

The Examiner has indicated that “should claim 1 be found allowable, claim 11 will be objected to under 37 CFR 1.75 as being a substantial duplicate thereof.”

Applicants acknowledge the Examiner’s objection. If a proper double patenting rejection is maintained until one or both of the involved claims becomes final, or until the double patenting objection is the only objection remaining relative to the two claims, Applicants will cancel one of the objected to claims.

**Claim Rejections – 35 USC §103:**

Claims 1-3, 5-7, 9, and 11 are rejected under 35 USC §103(a) as being unpatentable over Okada et al. in view of Porter et al. and either Prenger et al. or Kaltz et al. Claim 4 is rejected under 35 USC §103(a) as being unpatentable over Okada et al. in view of Porter et al. and either Prenger et al. or Kaltz et al., as applied to claim 1, and further in view of Hacker.

Section 103(a), establishes that “a patent may not be obtained though the invention is not identically disclosed or described as set forth in [Section 102], if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains.” 35 USC §103(a), MPEP 2141. As reiterated by the Supreme Court in *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007), the framework for the objective analysis for determining obviousness under 35 USC §103 is stated in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966). Obviousness is a question of law based on underlying factual inquiries. The factual inquiries enunciated by the Court are as follows:

- (A) Determining the scope and content of the prior art;
- (B) Ascertaining the differences between the claimed invention and the prior art;
- (C) Resolving the level of ordinary skill in the pertinent art.

MPEP 2141. The key to supporting any rejection under §103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. MPEP 2143. The Supreme

Court in *KSR* unequivocally requires that any analysis leading to a conclusion of obviousness “should be made explicit” to facilitate subsequent review, *see also* MPEP 2143. According to *KSR*, the Examiner should establish an “apparent reason” to modify the reference or to combine reference teachings. Additionally, when evaluating claims for obviousness under 35 USC 103, all the limitations of the claims must be considered and given weight. MPEP 2143.03.

**Rejection of claims 1-3, 5-7, 9, and 11 under Section 103(a) over Okada et al. in view of Porter et al. and either in view of either Prenger et al. or Kaltz et al.:**

The Examiner states that “Okada et al. have all claimed details less the disclosure for manual top movement and the handle for manually moving the top. Porter et al. teach, prior to the invention of applicant, (col. 4, lines 51-54) that motor failure of a convertible top can be overcome via manual movement and convertible top structure with a handle, allowing such manual movement is taught by either of the patents to Prenger et al. or Kaltz et al. in the shape of the front bow, fully graspable for closing.” The Examiner further states that “[i]t would have been obvious to one of ordinary skill to provide in Okada et al. manual override of a convertible top motor drive as taught by Porter et al. and a handle shaped front bow as taught by either Prenger et al. or Kaltz et al. in order to move the tope manually upon automatic motor failure from a convenient position within the passenger compartment.”

The Applicants respectfully disagree. The Examiner has not met the Graham factor requirements of: (A) determining the scope and content of the prior art; and (B) ascertaining the differences between the claimed invention and the prior art. Specifically, claim 1 recites, in part, “[a] closure device to close a convertible top (1)...a handle element (13), by which the convertible top (1) is movable manually between a *pre-closure position*...and a *catching position*, in which the convertible top (1) is closable automatically, and wherein the closure device (3) includes a sensor (12), by which assumption of the catching position of the convertible top (1) is detectable and which sends signals to a control unit of the drive unit (8), and the control unit, based on the signal of sensor (12) actuates the drive unit (8) to activate automatically the at least one closure element (6) or mating closure element (7) to attach the convertible top (1).” (Emphasis added).

It is noted that the fundamental purposes and structure of the applied references differ markedly from that of the present invention. The present invention addresses a problem not recognized by the four cited references. With reference to paragraph [0007]:

“A problem here is that, because of the tolerances of the convertible-top mechanism or the convertible-top material, especially in a convertible-top fabric, or because of stresses in the convertible top, the closed position or a pre-closed position can vary from vehicle to vehicle and even in one vehicle. Compensation for these tolerances is therefore necessary, which further increases the design expense, which is substantial in any case in a fully automatic closure mechanism.”

Also, with reference to paragraph [0008], “[a]nother task of the invention is to devise a closure mechanism that is as insensitive as possible to tolerances of the convertible top.” The remainder of the present application discloses a convertible-top that is only manually movable between a pre-closure position and a catching position by pushing a handle element, where a drive unit is activated to latch the convertible top when the catching position is sensed.

Okada et al., Porter et al., Prenger et al., and Kaltz et al. each fail to mention that movement between the pre-closure position and the catching position must be manual until the catching position is reached, where the convertible top at a catching position activates a drive unit to automatically actuate a closure element to latch the convertible top. The prior art is entirely silent as to compensating for tolerances in the closure of the convertible top in order to reduce the design expense associated with a *fully automatic* closure mechanism.

Instead, Okada et al discloses a fully automated convertible top. More specifically, the convertible top is moved automatically from the pre-closure position to the catching position with a motor and the convertible top is then automatically latched. Okada et al., therefore, relies on a closure mechanism that would necessarily be sensitive to tolerances, in order to achieve this fully-automatic system. Furthermore, paragraph [0023] of Okada et al. discloses that the catching position is detected only when “[t]he receiving pin 57 contacts the movable contact 62a of the *closed condition detection switch 62* and the *electric current* supplied to the electric motor 3, 4 *exceeds the predetermined value* by contact between the front roof pillar 12 and the front end portion 21a of the movable roof panel 21.” (Emphasis added).

Therefore, manually moving the convertible top from a pre-closure position to a catching position that, in turn, activates a closure element, is not expressly or inherently

disclosed by Okada et al. Moreover, any manual movement of the convertible top from a pre-closure position to a catching position that, in turn, activates a closure element is precluded by the operation and intended use of the structure in Okada et al.

Porter et al. fails to remedy these deficiencies of Okada et al. and the Examiner has not provided a reason to modify the reference to do so. Porter et al., as with Okada et al., fails to disclose manually moving the convertible top from a pre-closure position to a catching position that, in turn, activates an automatic closure element. Instead, Porter et al. discloses a convertible top that is moved automatically from a pre-closure position to a catching position with a motor. See col. 2, line 66-col. 3, line 1; col. 4, lines 44-47; and col. 6, lines 10-19. While Porter et al. discloses at col. 4, lines 51-54 that DC motors that “can be manually back-driven more easily than can hydraulic mechanisms...[to] ensure [that] manual override of the system can be effected in the event the system fails,” this is only effected in the event that the motor ceases to operate. Okada et al. fails to disclose that a closure element is activated upon the convertible top reaching the catching position as a result of the motor being “back-driven”. Unlike the limitations recited in claim 1 of the present application, Porter et al. discloses that the convertible top must be moveable both automatically and manually from the pre-closure position to the catching position. Therefore, Okada et al. also relies on a closure mechanism that would necessarily be sensitive to tolerances in order to achieve this fully-automatic system.

While Prenger et al. and Kaltz et al. each disclose a handle element for manually moving a convertible top of a vehicle, each of these references also fails to remedy the deficiencies of Okada et al. and the Examiner has not provided a reason to modify either of these references to do so. However, each of these references fails to disclose any electrically actuated automatic closure device, as required by claim 1.

The Examiner has failed to provide an apparent reason as to why it would be obvious to one of ordinary skill in the art at the time the invention was made to combine Okada et al., Porter et al., and Prenger et al. or Kaltz et al. “[R]ejections on obviousness cannot be sustained by mere conclusory statements; instead, [the Examiner must provide] some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR*, at 1396, quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). A proposed modification of the prior art to meet the claimed invention merely “because the references relied upon teach that all aspects of the claimed invention were individually known

in the art is not sufficient to establish a prima facie case of obviousness without some objective reason to combine the teachings of the references.” MPEP § 2143.01(IV) citing *Ex parte Levengood*, 28 USPQ2d 1300 (Bd. Pat. App. & Inter. 1993). Also, “the mere fact that references can be combined or modified does not render the resultant combination obvious unless the results would have been predictable to one of ordinary skill in the art.” MPEP § 2143.01(III) citing *KSR*, 82 USPQ2d at 1396.

Additionally, there is no reasonable expectation of success even if the automatic closure of Okada et al. were combined with the manual operation of the convertible top of Porter et al. and one of the handle elements of either Prenger et al. or Kaltz et al. More specifically, the automatic closure device of Okada et al. would cease to function if combined with the manually operated roof of Porter et al. As discussed above, Porter et al. discloses use of the “manually back-driven” motors in the event of system failure. Accordingly, Porter et al. discloses that when the motors are being “manually back-driven,” electric current is no longer being provided as the convertible top moves to the catching position. As discussed previously, the closure mechanism of Okada et al. is only activated when two conditions are met: (1) the receiving pin 57 contacts the contact 62a and (2) the electric current supplied to the motor exceeds a predetermined value. Therefore, when the manually operated convertible top is substituted for the automatic convertible top of Okada et al., the second condition will never be met and the automatic closure device will not operate.

Therefore, the rejection of claim 1 is overcome and is allowable for at least this reason. Also, claims 2, 3, 5-7, 9, and 11, which depend from allowable claim 1, are allowable for at least the same reasons that claim 1 is allowable.

**Rejection of claim 4 under Section 103(a) over Okada et al. in view of Porter et al. and either Prenger et al. or Kaltz, as applied to claim 1, and further in view of Häcker:**

The Examiner states that “[i]t would have been obvious to one of ordinary skill to provide in the combination above a release operating element 26 as taught by Hacker in order to control the pre-opening of the roof or conversely to release the latch upon CPU failure.”

Claim 4 depends from allowable claim 1 and is allowable for at least the same reasons that claim 1 is allowable.



Conclusion

It is therefore respectfully submitted that all claims are in condition for allowance,  
which action is requested.

Respectfully submitted,

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